86-259

No. 86-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF DES MOINES, IOWA,
NICK BROWN, and LARRY BEDFORD,
Petitioners,

vs.

ROBERT L. WILLSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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QUESTION PRESENTED FOR REVIEW

I. Can a plaintiff in state court expand an exclusive and adequate postdeprivation state law remedy in an action against a municipality and its employees by claiming relief under 42 U.S.C. § 1983 and thereby obtain attorney fees under 42 U.S.C. § 1988?

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NICK BROWN, and LARRY BEDFORD,
Petitioners,

vs.

ROBERT L. WILLSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

The Petitioners City of Des Moines, Iowa, Nick Brown and Larry Bedford respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this case on April 16, 1986, with rehearing denied on May 21, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa (App. A, infra, A1-A21) is reported at 386 N.W.2d 76 (Iowa 1986). The rulings of the Iowa District Court for Polk County on the Motion to Strike and Dismiss (App. B, infra, A22-A23), on the Plaintiff's Motion for Leave to Amend and to Reconsider (App. B, infra, A24-A31), Ruling on Motion for Directed Verdict (App. B, infra, A32-A37), Ruling on Defendants' Motion to Enlarge Findings (App. B, infra, A38), and Ruling on Motion to Reconsider. (App. B, infra, A39).

JURISDICTION

The judgment and opinion of the Supreme Court of Iowa was entered on April 16, 1986. A timely petition for rehearing was denied on May 21, 1986 by the Supreme Court of Iowa sitting en banc. (App. C, infra, A40). This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 4 to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmance, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14, Section 1 to the Constitution of the United States provides in relevant part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

§ 1, Civil Rights Act of 1871, 17 Stat. 13 provides:

An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other property proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with the subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Iowa Code § 613A.1 provides in relevant part:

As used in this chapter, the following terms shall have the following meanings:

* * *

3. "Tort" means every civil wrong which results in wrongful death or injury to persons or injury to

property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or denial or impairment of any right under any constitutional provision, statute or rule of law.

Iowa Code § 613A.2 provides:

Except as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function.

For the purpose of this chapter, employee includes a person who performs services for a municipality whether or not the person is compensated for the services, unless the services are performed only as an incident to the person's attendance at a municipality function.

Iowa Code § 613A.4 provides in relevant part:

* * *

The remedy against the municipality provided by section 613A.2 shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the officer, employee or agent whose act or omission gave rise to the claim, or the officer's, employee's, or agent's estate.

STATEMENT OF THE CASE

On June 11, 1981 Robert L. Willson filed an action in the Iowa District Court for Polk County against the City of Des Moines, Iowa and several Des Moines police

officers, including Nick Brown and Larry Bedford, seeking relief for false imprisonment (in the sum of $600,000.00), malicious prosecution (in the sum of $600,000.00), trespass (in the sum of $60,000.00), conversion (in the sum of $200,000.00), and interference with prospective business advantage (in the sum of $200,000.00) as a result of their allegedly unlawfully obtaining and executing a search warrant. Willson also sought relief for the same acts under 42 U.S.C. § 1983 (in the sum of $600,000.00), because he claimed these acts violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. On July 31, 1981 the City of Des Moines and the named individual police officer defendants filed a timely Motion to Strike and Motion to Dismiss the § 1983 claim upon the grounds that Willson's claim under federal law did not displace state law remedies, that § 1983 does not provide independent substantive rights and that the claim was therefore superfluous. The Iowa District Court on September 25, 1981 sustained the motion and struck the claim under 42 U.S.C. § 1983 from the petition. (App. B, infra, A23).

On March 1, 1984 Willson filed a Motion to Reconsider Ruling in which he asked the Iowa District Court to reinstate his claim under 42 U.S.C. § 1983 and on March 13, 1984 moved for permission to file an Amended and Substituted Petition which realleged in Count I his claim for relief under 42 U.S.C. § 1983. The City of Des Moines and the police officers resisted both motions. By ruling dated May 10, 1984 the District Court reinstated the claim under 42 U.S.C. § 1983 and allowed Willson to file his Amended and Substituted Petition. (App. B, infra, A31). On June 18, 1984 the City of Des Moines and the individual defendants filed an Answer to the Amended

and Substituted Petition in which in addition to denials they raised as an affirmative defense the claim that Chapter 613A of the Code of Iowa is an exclusive remedy for claims such as Willson's against a municipality and its employees brought in state court.

The case was tried to a jury in Polk County, Iowa upon Willson's claims of tortious interference with prospective business advantage, invasion of privacy, conversion and deprivation of rights under 42 U.S.C. § 1983. Prior to submission all defendants moved for a directed verdict on several grounds. The trial court reserved ruling on the motions. On August 8, 1985 the jury returned a verdict on Willson's 42 U.S.C. § 1983 claim against Officer Bedford in the sum of $5,150.00 actual damages and $1,000.00 punitive damages; against Officer Brown in the sum of $500.00 actual damages and $500.00 punitive damages. In addition the jury awarded judgment against Nick Brown in the sum of $3,000.00 actual damages and $1,000.00 punitive damages for invasion of privacy and against the City of Des Moines for $258.50 for conversion.

The City of Des Moines made additional motions for directed verdict claiming inter alia that Section 613A of the Code of Iowa was an adequate and exclusive remedy for a person in Willson's position. The Iowa District Court treated the motions as asking for judgment notwithstanding the verdict, and struck those portions of the verdict granting relief for invasion of privacy under state law and struck all punitive damage awards, including those under 42 U.S.C. § 1983, because of lack of evidence to support the claim. (App. B, infra, A32-A37). The District Court also entered an award for attorney fees against the defendants under 42 U.S.C. § 1988 in the amount of $21,058.42. All judgments were subsequently entered against the City

of Des Moines based upon its liability under Chapter 613A of the Code of Iowa for the torts of its employees. (App. C, infra, A49).

The City of Des Moines and the individual police officers made timely appeal to the Supreme Court of Iowa on the grounds that 42 U.S.C. § 1983 was not available to Willson. Willson cross appealed. The Iowa Supreme Court, after extended discussion, held that the claim under 42 U.S.C. § 1983 was properly maintained in state court without regard to the availability of an adequate post-deprivation remedy under Chapter 613A of the Iowa Code. (App. A, infra, A13). The Iowa Court affirmed the award of attorney fees against the City and awarded Willson an additional $5,000.00 in attorney fees upon appeal. In addition the Iowa Supreme Court affirmed the trial court denial of recovery for invasion of privacy and upheld the judgment against the City for conversion. As to the individual defendants the Iowa Court reinstated the award of $1,000.00 in punitive damages under 42 U.S.C. § 1983 only against Officer Bedford.

All defendants filed a timely Petition for Rehearing before the Iowa Supreme Court urging that the Court's interpretation of 42 U.S.C. § 1983 was in conflict with this Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961). The Petition for Rehearing was denied on May 21, 1986 by the Iowa Supreme Court sitting en banc and this Petition follows therefrom. (App. C, infra, A40).

REASONS FOR ALLOWANCE OF WRIT

1. The decision of the Supreme Court of Iowa on an important question of federal law conflicts with a decision of the Supreme Court of South Carolina.

A conflict exists between the Supreme Court of Iowa and the Supreme Court of South Carolina over the interpretation of a basic federal civil rights statute concerning an issue not yet settled by a majority of this court. The issue in this case involves the availability in state courts of relief under 42 U.S.C. § 1983. This conflict has significant national impact upon the tort liability of all governmental subdivisions.

In 1984 the Supreme Court of South Carolina held in *Spencer v. South Carolina Tax Commission,* 281 S.C. 492, 316 S.E.2d 386 (S.C. 1984) that:

> "Section 1983 does not provide for any substantial rights; it is remedial. State remedies for asserting rights may not be circumvented by invoking § 1983. It may reasonably be inferred that the sole reason for alleging § 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress when it enacted §§ 1983 and 1988."

316 S.E.2d at 389, citations omitted. *Spencer* was affirmed by an equal division of this Court. *Spencer v. South Carolina Tax Commission,* ..... U.S. ....., 105 S.Ct. 1859 (1985).

In its decision below the Iowa Supreme Court felt obliged to reconcile two decisions of this Court, *Monroe v. Pape,* 365 U.S. 167 (1961) with *Parratt v. Taylor,* 451 U.S. 527 (1981). The Iowa Supreme Court saw an irreconcilable tension between *Parratt* and *Monroe* unless § 1983

claims against municipalities, such as Willson's, could be maintained in state court without regard to "the availability of state postdeprivation remedies where the alleged deprivation violates specific Bill of Rights provisions." (App. A, infra, A13).

In *Monroe* this Court held that a federal plaintiff need not initiate an action to recover on related tort remedies in state court prior to filing a § 1983 action in federal court. (For a discussion of *Monroe* see Justice Rehnquist's opinion joined in by the Chief Justice and Justice Blackman dissenting from denial of certiorari in *City of Columbus, et al. v. Leonard,* 443 U.S. 905 (1979).) In *Parratt* this Court held that claims alleging violations of Fourteenth Amendment due process rights are not to be heard in federal court if there exists in state law an adequate postdeprivation remedy.

The Iowa Court's view cannot be reconciled with the decisions of the South Carolina Court.

Because of this conflict between the highest courts of two states which has a direct and significant impact upon all governmental subdivisions, this Court should issue a writ of certiorari to the Iowa Supreme Court to clarify and settle the dispute as to the proper role of this important and often litigated federal statute in state court actions.

2. The Iowa Court misconstrued this Court's rulings and significantly expanded the applicability of § 1983 in ways neither intended by Congress nor endorsed by this Court.

The Defendants have from the inception of this case challenged the Plaintiff's § 1983 action on three grounds:

(1) § 1983 does not provide any substantive rights. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 617-618 (1979);

(2) Iowa Code Chapter 613A provides for a tort action for all civil wrongs including any "denial or impairment of any right or any constitutional provision", Iowa Code § 613A.1(3); and

(3) Iowa Code Chapter 613A provides the *exclusive* remedy for any civil wrong such as Willson's in Iowa state courts against a municipality or one of its officers. Iowa Code § 613A.4.

Each of these grounds was rejected by the State District Court. The case proceeded to trial and ultimately a judgment was entered against the Defendants on the Plaintiff's state tort claims and the § 1983 claim. Attorneys fees were then awarded to the Plaintiff under 42 U.S.C. § 1988.

There is no question that Chapter 613A of the Code of Iowa provides a complete and adequate remedy for Willson. (App. A, infra, A10). In the opinion below the Iowa Supreme Court recognized that under Iowa Code § 613A.4, Chapter 613A provides the exclusive remedy for any civil action against a municipality or one of its officers. *Id.* In *Rhiner v. City of Clive,* 373 N.W.2d 466, 472 (Iowa 1985), the Iowa Court said Chapter 613A provides an adequate postdeprivation remedy. Even more importantly, Willson has never claimed the state remedy is inadequate.

The question to be decided is whether Willson was entitled to the additional relief available under § 1983 including attorney fees in light of the exclusive state remedy provided by Iowa Code Chapter 613A under which attorney fees could not be awarded. In the challenged opinion the Iowa Supreme Court held that a person could

maintain a § 1983 action in state court irrespective of any available state remedy. (App. A, infra, A13). It said it was obligated to do so because of this Court's holding in *Monroe v. Pape,* 365 U.S. 167 (1961). The Iowa Court in its own words felt constrained to rule as it did, not upon any independent state law basis, but based upon its view of this Court's holding in *Monroe* and *Parratt.* (App. A, infra, A12).

This is a startling decision. Under it, § 1983 supplants Iowa tort law, adequate in theory and adequate in practice. Under the law as announced by the Iowa Supreme Court, plaintiffs with traditional state law tort claims are enticed into using § 1983 to secure attorney fee awards not otherwise available to them under the American rule in such cases. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). Such a result places an unwarranted gloss on the statute, is contrary to the intent of Congress and is in derogation of the exercise by the states of their right to develop their own systems of justice which is the genius of our federal system. *Duncan v. Louisiana,* 391 U.S. 194, 213-14 (1967), Justice Fortas concurring, *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1931), Justice Brandeis dissenting. This is a truly ominous change in the law. It is therefore imperative that *Monroe* be examined to determine if it demands the result reached by the Iowa Court.

3. In Monroe, this Court did not hold that a person could maintain a § 1983 action in state court irrespective of any available state remedy.

This Court in *Monroe* did not hold that an action under § 1983 could be maintained in state court without regard to available and adequate state remedies. In fact,

it held that one seeking redress for the deprivation of federal rights in federal court need not first initiate state proceedings based upon related state causes of action. The decision in *Monroe* does not stand for the proposition that there must be exhaustion of state remedies before a plaintiff proceeds to bring a § 1983 action in *state* court. Rather, *Monroe* is concerned with whether a plaintiff may bring a § 1983 action in *federal* court without first exhausting his state remedies. Indeed in its opinion, this Court only dealt with § 1983 suits in federal court. It said:

> Although the legislation [section 1983] was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present *suit in federal court.*

365 U.S. at 183 (Emphasis added).

In *Monroe* this Court, in reviewing the legislative history of § 1983, observed:

> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a *federal* right in *federal* courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges,

> and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

365 U.S. at 180 (Emphasis added).

Under this Court's own interpretation, Congress enacted § 1983 to create a federal right in federal courts. There is no mention of any intent to abrogate state laws in state courts. Congress did not intend to have § 1983 proceedings in state court. Instead, Congress provided for § 1983 proceedings to be in federal court because it distrusted state courts as forums for the protection of citizens from the abuse by state officials of governmental powers. This point is not a matter of interpretation; it is in the language of the statute itself. § 1 Civil Rights Act of 1871, 17 Stat. 13 (1871).

Those who elect state courts as the forum for determination of their claims, by the act of selection, indicate a confidence in state courts as being able to protect them and able to redress any abuses of their rights made under color of state law. Thus the policy considerations which underlie § 1983 claims in federal court are not applicable to claims concerning the acts of local or state officials brought in state court. Indeed in the present case the plaintiff has recovered his judgment, except for attorney fees because the claim, although couched in § 1983 terms, was clearly cognizable under Chapter 613A of the Code of Iowa and the City of Des Moines has never challenged plaintiff's entitlement to relief under Chapter 613A after final determination by Iowa courts.

The Iowa Supreme Court's interpretation that *Monroe* requires § 1983 claims be heard in state court irrespective of state law remedies is at odds with this Court's own interpretation of *Monroe* as expressed in *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975). This Court clearly said in *Huff-*

man that *Monroe* merely establishes that a plaintiff seeking redress for the deprivation of federal rights in federal court need not first initiate state court proceedings based on related state causes of action. 420 U.S. at 609 fn.21.

Huffman further explained that *Monroe* was not concerned with the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues. *Id.* This point was clearly understood. In fact, it prompted Justice Brennan to dissent. He said the ruling in *Huffman* drastically undercut *Monroe* and required exhaustion of state remedies after a complaint had been filed in state court. 420 U.S. at 617.

The Iowa Court's misconstruing of *Monroe* is particularly egregious when viewed in light of its heavy reliance on *Parratt*. In effect the Iowa Court has done to *Parratt*, through its erroneous construction of *Monroe*, exactly what it said it was attempting to avoid doing to *Monroe*, that is treat it as though it had been overruled. (App. A, infra, A12).

By holding that adequate state postdeprivation remedies are supplanted by § 1983 the Iowa Court has eviscerated this Court's teaching in *Parratt*: every alleged injury inflicted by a public official may be said to be under "color of state law", but that alone does not give rise to a cause under § 1983 if there exists an adequate postdeprivation remedy for the state wrong in state courts. 451 U.S. 527, 543 (1981). The rationale of *Parratt* focuses upon the legitimate overriding interests which arise from the nature of our federal system and mandate that the state tort systems be protected from being swallowed by § 1983 claims. Justice Powell concurring 451 U.S. 527, 554 fn.13.

CONCLUSION

Because of the manifest conflict between the holding of the Iowa Supreme Court in this case with the holding of the Supreme Court of South Carolina in *Spencer v. South Carolina Tax Commission,* 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court,* ..... U.S. ....., 105 S.Ct. 1859 (1985) and because the decision of the Iowa Supreme Court improperly determines issues of federal law in a way that adversely touches all governmental subdivisions and by its reasoning undermines state law in a manner inconsistent with this Court's holding in *Parratt v. Taylor,* 451 U.S. 527 (1981) this Court should issue a Writ of Certiorari to the Supreme Court of Iowa to resolve the conflict and settle the pending issue of federal law.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed April 16, 1985)

IN THE SUPREME COURT OF IOWA

ROBERT L. WILLSON, Appellee,	)	
vs.	)	43
CITY OF DES MOINES, IOWA; NICK BROWN; and LARRY BEDFORD, Appellants.	)	84-1531

Appeal from the Iowa District Court for Polk County, Joel D. Novak and Richard D. Morr, Judges.

Appeal and cross-appeal from damages allowed in tort action involving common law claims and claims under 42 U.S.C. section 1983. AFFIRMED ON APPEAL; AFFIRMED IN PART AND REVERSED IN PART ON PLAINTIFF'S CROSS-APPEAL; AND REMANDED.

Loren J. Braud and J. M. Sullivan, Assistant City Attorneys, Des Moines, for appellants.

William J. Conroy, Jr., Des Moines, for appellee.

Considered by Uhlenhopp, P.J., and McGiverin, Schultz, Wolle and Lavorato, JJ.

McGIVERIN, J.

Defendants City of Des Moines, Nick Brown and Larry Bedford challenge a judgment entered on a jury verdict in favor of plaintiff Robert L. Willson on Willson's claims for damages under 42 U.S.C. section 1983 (1981). Plaintiff

asserts that the defendant Des Moines police officers, Brown and Bedford, deprived him of his constitutional rights when making application for, and in the execution of, a search warrant for his property. Plaintiff Willson on cross-appeal contends that the district court erred in directing a verdict on his invasion of privacy claim and on the issue of punitive damages. We now affirm the district court as to defendants' appeal and affirm in part and reverse in part as to plaintiff's cross-appeal. We remand with directions for entry of appropriate judgment.

The events giving rise to this appeal arose in connection with the application for and execution of a search warrant for plaintiff's home and place of business. Des Moines police officers Nick Brown and Larry Bedford were a part of a police tactical unit which had been attempting a sting operation in an effort to curb the sale of stolen property.

On January 11, 1981, defendant Brown and Richard Schaffer, another member of the tactical unit, provided information, and Schaffer made application to the district court for a search warrant to be executed at plaintiff's home and place of business. The search warrant which was issued by the court allowed peace officers to search for specified shotguns, a handgun and a television set.

On January 13, the warrant for plaintiff's home and place of business was executed by Des Moines police officers. The items authorized to be seized in the search warrant were not found, but a large quantity of other items, such as tools, were seized by the officers during the execution of the warrant. Plaintiff was arrested at that time on a theft charge which was later dismissed. Defendant Bedford was the officer supervising the search at Willson's Auto Body Shop, plaintiff's place of business.

There was another search warrant executed that same day at a Des Moines residence as a part of the sting operation. That search was not connected with Willson.

Later that day, the news media apparently was informed by defendant Brown at the Des Moines police station of the execution of the warrants. Plaintiff allleges that in these conversations Brown made untrue statements.

Most of the property seized at Willson's home and business later was determined not to be stolen and was returned to him with the exception of a few items.

Plaintiff's original petition filed on June 11, 1981, was based on a 42 U.S.C. section 1983 count alleging defendants violated plaintiff's fourth and fourteenth amendment rights under the United States Constitution in unlawfully obtaining and executing the search warrant. In addition, there were five common law tort claims including false imprisonment and false arrest, malicious prosecution, trespass, conversion and interference with prospective business advantage.

On March 13, 1984, plaintiff moved to amend his petition, Iowa Rule of Civil Procedure 88, to state an additional claim for invasion of privacy by defendants, alleging that their statements put him in a false light. This was resisted by defendants, but the amendment was allowed by the court.

Defendants filed an answer to plaintiff's amended petition, contending that Iowa Code chapter 613A (1981) provided the exclusive remedy in Iowa for torts of municipalities and their employees.

The case then proceeded to trial. At the close of plaintiff's evidence and of all evidence, defendants moved,

in the court-reported record, for dismissal or for a directed verdict on several grounds. Iowa R. Civ. P. 216. The court reserved ruling on the motion.

The case was submitted to the jury, and a verdict was returned against defendant Bedford on plaintiff's section 1983 claim that he exceeded the scope of the search warrant in executing it. Actual damages of $5,150 and punitive damages of $1,000 were awarded to plaintiff on this count. The jury also returned a verdict against defendant Brown on the section 1983 claim that Brown made material misrepresentations to the court in obtaining the search warrant and awarded plaintiff $500 actual damages and $500 in punitive damages. A verdict was returned against defendant Brown on plaintiff's false light invasion of privacy claim, and actual damages of $3,000 and punitive damages of $1,000 were awarded. The jury also returned a verdict against the City of Des Moines on the conversion claim in the amount of $258.50 for property improperly taken under the search warrant and not returned to plaintiff.

Defendants then filed written motions for directed verdict, again asserting that Iowa Code chapter 613A provided the exclusive remedy for plaintiff's claims, and, thus, there was no claim available under section 1983. Defendants also moved for a directed verdict as to punitive damages against all defendants and for dismissal of the invasion of privacy claim.

The court granted defendants' motion for a directed verdict on the invasion of privacy claim against defendant Brown on the ground that the evidence failed to show Brown had knowledge or acted in reckless disregard as to the falsity of the publicized statements. This ruling was in substance a grant of judgment notwithstanding the

verdict. Iowa R. Civ. P. 243. The court also granted defendants' motion for directed verdict as to the punitive damage portion of the section 1983 claims, finding the evidence insufficient to support the awards because there was no evidence of any malice or reckless disregard for plaintiff's constitutional rights on the part of any defendant. Defendants' other motions were overruled. In its ruling, the district court also held plaintiff entitled to attorney fees because of the jury's damage awards under section 1983. *See* 42 U.S.C. § 1988.

Judgment was entered against defendant Bedford for the sum of $5,150 compensatory damages under the section 1983 claim and for the same amount against defendant City of Des Moines for vicarious liability for its employee under Iowa Code sections 613A.2 and 613A.8. Defendant City of Des Moines was held liable for the amount of $258.50 on the conversion claim. Judgment was entered against defendant Brown in the amount of $500 compensatory damages under section 1983 and for the same amount against the City of Des Moines pursuant to Iowa Code section 613A.2. The court also awarded plaintiff Willson attorney fees of $21,058.42 under 42 U.S.C. section 1988 and interest thereon from the date of the favorable verdict.

Defendants appealed to us. Plaintiff timely filed notice of cross-appeal. Iowa R. App. P. 5(a).

The determinative issues we must consider are: 1) whether plaintiff was entitled to relief under 42 U.S.C. section 1983 in light of the state remedy provided in Iowa Code chapter 613A; 2) whether plaintiff was properly awarded attorney fees for this action; 3) whether the district court erred in directing a verdict on plaintiff's

false light invasion of privacy claim; and 4) whether the district court erred in directing a verdict on plaintiff's claims against defendants Brown and Bedford for punitive damages. The first two issues are raised on defendants' appeal and the last two on plaintiff's cross-appeal.

I. *Availability of 42 U.S.C. section 1983.* 42 U.S.C. section 1983 gives individuals a cause of action for damages and injunctive relief for deprivations of federally protected rights caused by persons acting under color of state law. *Carey v. Piphus,* 435 U.S. 247, 253, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252, 258 (1978). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

B. *Categories of constitutional rights deprivation cases.* We must determine the type of constitutional deprivation plaintiff allegedly has suffered. In *Daniels v. Williams,* 474 U.S. , , 106 S. Ct. , , 88 L. Ed. 2d 662, 672 (1986) (Stevens, J., concurring), it was stated:

> It is not enough to note that they [petitioners] rely on the Due Process Clause of the Fourteenth

> Amendment, for that Clause is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in the First and Eighth Amendments; so too, the State must respect the guarantees in the Fourth, Fifth, and Sixth Amendments. Second it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them." Ante, at ....., 88 L. Ed. 2d 668. Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards.
>
> The type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of § 1983 relief.

(Footnotes omitted.)

Plaintiff Willson sued under section 1983 seeking damages for fourth and fourteenth amendment violations which allegedly occurred on January 13, 1981, when defendants acting under color of state law obtained and executed a search warrant on his property. The fourth amendment has been held applicable to the states by virtue of the adoption of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1090 (1961). Thus, plaintiff alleged a violation of a specific constitutional right as defined in the Bill of

Rights, not purely a claim for deprivation of due process under the fourteenth amendment.

The district court submitted to the jury under section 1983 the issues of whether the search warrant was obtained by material misrepresentations and whether defendants exceeded the scope of the warrant in executing it.

Having concluded that plaintiff's petition properly states a claim for deprivation of federal constitutional rights, the question becomes whether that deprivation is actionable under section 1983. Thus, we turn to defendants' argument that this suit is barred by the principles enunciated in *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

Parratt involved a section 1983 suit for damages of $23.50 brought by a prison inmate in Nebraska against a warden and a prison hobby manager for their alleged negligence in causing the loss of certain hobby materials ordered by mail. The plaintiff alleged that the defendants deprived him of property without due process of law. The Court found plaintiff's interest in his hobby materials was clearly a property interest under state law and, therefore, a property interest for due process purposes as well. The alleged loss of the hobby materials, even though negligently caused, was held to be a deprivation.[1] How-

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1. This part of the holding, that the due process clause is implicated through the negligence of a state official, in Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) has been overruled. In Daniels v. Williams, 474 U.S. , 106 S. Ct. , 88 L. Ed. 2d 662 (1986) and Davidson v. Cannon, 474 U.S. , 106 S. Ct. , 88 L. Ed. 2d 677 (1986), the Court held that mere negligence by a state official is not the type of state action the fourteenth amendment's due process clause was intended to prevent. As a result, the two inmates were not allowed to proceed under section 1983 against corrections officers who allegedly were negligent in protecting them from various injuries.

ever, the Court reasoned, citing *Ingraham v. Wright,* 430 U.S. 651, 682, 97 S. Ct. 1401, 1418, 51 L. Ed. 2d 711, 737 (1977), that plaintiff had an adequate remedy under state law.[2] 451 U.S. at 542-43, 101 S. Ct. at 1916, 68 L. Ed. 2d at 433. Nebraska provided an adequate postdeprivation hearing under state law in the form of a tort action against the state that would fully compensate the plaintiff. *Id.* at 543, 101 S. Ct. at 1917, 68 L. Ed. 2d at 434.[3]

Therefore, the Court reasoned, the alleged deprivation of property[4] while wrongful was not without due process of law, and, thus, the inmate's claim failed to state a cause of action under 42 U.S.C. section 1983.

Thus, *Parratt* suggests that if a plaintiff has a post-deprivation state remedy avaliable, due process may be satisfied. In the present case, plaintiff presumably could

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2. In Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), plaintiffs were junior high school students challenging the constitutionality of a state statute which permitted school authorities to administer corporal punishment. In addressing plaintiffs' procedural due process claim, the Court found a liberty interest safeguarded by the due process clause was implicated by the imposition of corporal punishment. However, the deprivation was found not to be without due process because the state provided the students with reasonable damage remedies through its common law of torts which were "fully adequate to afford due process." *Id.* at 672, 97 S. Ct. at 1413, 51 L. Ed. 2d at 731. *See* Note, Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right, 43 Univ. of Pitt. L. Rev. 1035 (1982).

3. *See* Neb. Rev. Stat. §§ 81-8,209-39 (1976).

4. The logic of *Parratt* permits no principled distinction between deprivations of property and liberty interests. Therefore, this court has followed those jurisdictions which apply *Parratt* to a deprivation of a liberty interest. Rhiner v. City of Clive, 373 N.W.2d 466, 472 (Iowa 1985). In *Rhiner,* we held that availability of a state tort claim remedy, such as our Iowa Code chapter 613A procedure, may negate a claimant's assertions under section 1983 that he or she was deprived of liberty without due process of law. 373 N.W.2d at 472.

seek redress against defendants in a state court action brought under Iowa Code chapter 613A. That statute, known as the Municipal Tort Claims Act, provides the exclusive remedy for any civil action against a municipality or one of its officers.[5] Iowa Code § 613A.4. Defendants claim that this state remedy provides adequate relief, and, thus, plaintiff's action under section 1983 is foreclosed.

However, two important restrictions on the *Parratt* rationale exist. First, *Parratt* does not apply if a plaintiff alleges that the constitutional deprivation occurred as a part of an established state procedure.[6] Here, plaintiff does not contend that the alleged violations occurred as a result of an established state procedure. Thus, this first restriction is inapplicable. Second, and most crucially, *Parratt* only represents a restriction on a claim alleging a deprivation of an underlying right to procedural due process.

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5. Iowa Code Section 613A.1(3) defines a tort as:

> every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or *denial or impairment of any right under any constitutional provision,* statute or rule of law.

(Emphasis supplied.)

6. In Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420, the Nebraska prison authorities had established procedures designed to ensure delivery of packages to inmates and to minimize chances of loss. *Id.* at 530, 101 S. Ct. at , 68 L. Ed. 2d at 425. The packages were lost because prison employees negligently failed to follow these procedures. If, however, prison regulations had authorized prison employees to dispose summarily of packages addressed to inmates, then any loss occasioned by employees acting pursuant to those regulations would have constituted a due process violation, actionable under section 1983, regardless of state postdeprivation remedies.

B. *Violations of specific constitutional rights.* The *Parratt* doctrine only applies to claimed violations of procedural due process. It is not applicable to violations of specific constitutional rights contained in the Bill of Rights and made applicable to the states by virtue of the fourteenth amendment regardless of the availability of a state remedy. *See Daniels,* 474 U.S. at , 106 S. Ct. at , 88 L. Ed. 2d at 672-73 (Stevens, J., concurring).

In *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), *overruled in part on other grounds, Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), which involved a claim brought under the fourth amendment, the Supreme Court held that plaintiff could maintain a section 1983 action irrespective of any available state remedy. The Court stated:

> Although the legislation [section 1983] was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. *It is no answer that the State has a law which if enforced would give relief.* The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in federal court.

Id. at 183, 81 S. Ct. at 482, 5 L. Ed. 2d at 502-03. (Emphasis added.)

The Court in *Parratt,* which applied to claims of an alleged denial of due process, clearly distinguished that case

from one such as *Monroe* where plaintiff's fourth amendment rights had been violated by stating:

> The only deprivation respondent alleges in his complaint is that "his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." App. 8. As such, respondent's claims differ from the claims which were before us in *Monroe v. Pape, supra,* which involved violations of the Fourth Amendment, and the claims presented in *Estelle v. Gamble,* 429 US 97, 50 L Ed 2d 251, 97 S Ct 285 (1976), which involved alleged violation of the Eighth Amendment. . . . Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment simpliciter.

Parratt, 451 U.S. at 536, 101 S. Ct. at 1913, 68 L. Ed. 2d at 429. Civil rights plaintiffs have not had difficulty getting the federal courts to recognize this distinction.[7]

Thus, to adopt defendants' interpretation would create an irreconcilable tension between *Parratt* and *Monroe. Parratt* did not purport to overrule *Monroe,* yet the suggested interpetation of it would have that effect. Until and unless *Monroe* is overruled by the Supreme Court, we believe we are obliged to follow it.

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7. *See* L & H Sanitation v. Lake City Sanitation, 769 F.2d 517 (8th Cir. 1985); Thibodeaux v. Burdelon, 740 F.2d 329 (5th Cir. 1984) (eighth amendment); Wolf-Lillie v. Sanquist, 699 F.2d 864, 871-72 (7th Cir. 1983) (fourth amendment); Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982) (*Parratt* does not apply to substantive due process violations); Duncan v. Poythress, 657 F.2d 691, 704-05 (5th Cir. 1981), *cert. dismissed,* 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982) (right to vote).

We conclude *Parratt* does not apply to bar a section 1983 suit despite the availability of state postdeprivation remedies where the alleged deprivation violates specific Bill of Rights provisions. Such conduct would be actionable under section 1983 irrespective of the procedural protections accompanying it which are afforded by the state.

Plaintiff's claim, therefore, survives *Parratt*. Plaintiff has a substantive right under the fourth amendment to be free from unreasonable searches and seizures. If defendants did indeed violate this right, then it is constitutionally impermissible no matter what type of procedural protections accompany it, and the availability of a postdeprivation state law remedy is no defense to applicability of section 1983.

II. *Attorney fees.* The district court awarded plaintiff attorney fees pursuant to 42 U.S.C. section 1988. That statute provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988 allows a winning plaintiff who has brought a claim under section 1983 or one of the other expressly delineated statutes to recover attorney fees. *Blessum v. Howard County Board of Supervisors*, 295 N.W.2d 836, 846 (Iowa 1980).

Because we have determined that plaintiff properly brought his cause of action under section 1983, we conclude that section 1988 is applicable, and, thus, the district

court properly awarded plaintiff reasonable attorney fees against defendants. On appeal, defendants do not contest the amount awarded as district court attorney fees.

Plaintiff also has made application, which is resisted by defendants, for appellate attorney fees under 42 U.S.C. section 1988. Upon due consideration, we conclude plaintiff is entitled to $5,000 in appellate attorney fees to be taxed as costs.

III. *Invasion of privacy claim.* Plaintiff, on cross-appeal, contends that the district court erred in directing a verdict on his false light invasion of privacy claim against defendant Brown. *See* Iowa R. Civ. P. 216, 243. The court reasoned that there was no evidence that defendant Brown had knowledge of the falsity of the published matter or that he acted in reckless disregard of the falsity of it. We affirm the court's ruling directing a verdict for defendant Brown on a ground urged by defendant, but not relied upon by the district court.

Plaintiff's original petition filed June 11, 1981, asserted only claims under 42 U.S.C. section 1983 and common law claims for false imprisonment and false arrest, malicious prosecution, trespass, conversion and interference with prospective business advantage. These claims all arose out of plaintiff's arrest and the search and seizure of property at his residence and business.

On March 13, 1984, however, some three years after the search and seizure and over two years after the original petition was filed, plaintiff moved for leave to amend his petition, Iowa Rule of Civil Procedure 88, to add a count for invasion of privacy. Plaintiff contended that defendant Brown's statements to the news media which were

made at the Des Moines police station invaded plaintiff's privacy by holding him out publicly in a false light.[8]

Defendants resisted the motion because the invasion of privacy claim or count was not included in plaintiff's original petition, the incident referred to was distinct in time and nature from the claims stated in the original petition, and the new count substantially changed the issues.

The district court granted plaintiff leave to amend and found that the added tort claim related back to the date of the original petition, so it was not precluded by the Iowa Code section 613A.5 limitation that an action must be commenced within six months unless a written notice of claim has been presented to the municipality within sixty days after the alleged wrong. Iowa R. Civ. P. 89. The amended petition clearly was filed after the time for bringing suit had expired, so unless this count of the amended petition relates back under Iowa Rule of Civil Procedure 89, it is time-barred.

Iowa Rule of Civil Procedure 88 provides that leave to amend a petition should be freely given when justice so requires. It is within the court's discretion as to whether an amendment should be allowed, and the court's decision will be reversed only if there is a clear abuse of that discretion. *Freeman v. Bonnes Trucking, Inc.*, 337 N.W.2d 871, 878 (Iowa 1983). Rule 89 also governs amendments to

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8. We have long recognized this common law tort and have adopted the elements of false light invasion of privacy as set forth in the Restatement (Second) of Torts § 652E (1977). A claim for false light invasion of privacy is based upon an untruthful publication which places a person before the public in a manner that would be highly offensive to a reasonable person. *See* Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 248 (Iowa), *cert. denied*, 454 U.S. 1086 (1981).

pleadings and provides in pertinent part that "[w]henever the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

At issue here is whether plaintiff's invasion of privacy claim arose out of the same "conduct, transaction or occurrence" as the section 1983 constitutional rights deprivation claim and the original common law tort actions alleged in the 1981 petition. We believe it did not. The evidence showed, as defendants contended before the amendment was allowed, that Brown's statements to the media were made in a separate incident at the police station at a time *after* the execution of the search warrants at plaintiff's home and business place and the other Des Moines residence were completed. The "news media" incident was not referred to in plaintiff's 1981 petition.

An amendment should not be allowed if it would substantially change the issues in the case. *Ackerman v. Lauver,* 242 N.W.2d 342, 345 (Iowa 1976). The court also must consider other factors such as whether the nonamending party would be prejudiced. *See Farmers Insurance Group v. Merryweather,* 214 N.W.2d 184, 188-89 (Iowa 1974).

The amended petition significantly expanded the scope of the litigation. Events and conversations occurring after the search warrant was obtained and executed, having nothing to do with the validity of the warrant or the scope of the search, were brought into play and became relevant. The newspersons who covered the story were unable to remember three years after the event what defendant Brown told them that served as the basis of their news stories.

This constitutes unfair surprise and prejudice. In this case, there was nothing in the original petition indicating plaintiff was concerned with or was making a claim about defendant Brown's motives or conduct *after* the search. The effects of the passage of time were particularly evident in witnesses' testimony at trial concerning the invasion of privacy claim.

Several federal cases have reached a similar result under Federal Rule of Civil Procedure 15(c) which is identical to our rule 89. *See Fuller v. Marx,* 724 F.2d 717, 720-21 (8th Cir. 1984) (amendment to add count of intentional infliction of emotional harm to original complaint alleging negligence in the performance of an autopsy did not relate back to the original complaint); *Barnes v. Callaghan & Co.,* 559 F.2d 1102, 1105-06 (7th Cir. 1977) (amendment to add cause of action for slander did not relate back to original complaint alleging cause of action for sex discrimination under 42 U.S.C. § 2003-2(a)(1) and breach of contract).

For these reasons, we affirm the district court in directing a verdict on the issue of plaintiff's invasion of privacy claim.

IV. *Punitive damages.* Plaintiff also asserts on cross-appeal that the district court improperly directed a verdict in favor of defendants Brown and Bedford on the issue of punitive damages. Plaintiff does not appeal this ruling as to defendant City of Des Moines. Because we have concluded that the district court was correct in directing a verdict on plaintiff's false light invasion of privacy claim, we only consider the award of punitive damages on the section 1983 constitutional claims. The jury awarded punitive damages to plaintiff on the section 1983 claim against defendant Brown alleging that he made ma-

terial misrepresentations in obtaining the search warrant and against defendant Bedford on the grounds that he exceeded the scope of the search warrant. We will consider each defendant separately.

A. *Defendant Nick Brown.* In order to properly award punitive damages, defendant Brown had to have been motivated by evil motive or intent or reckless or callous indifference to plaintiff's constitutional rights. *See Smith v. Wade,* 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L. Ed. 2d 632, 651 (1983). We conclude there was no substantial evidence sufficient to satisfy this standard and that the district court properly directed a verdict on this issue as to defendant Brown.

The record shows that Brown did not sign the application for search warrant, although he provided some of the information for it. He had reasonable cause to believe the information he furnished was accurate. Officer Schaffer signed the application, and an assistant county attorney reviewed and approved the application prior to its submission to the court. Further, Brown did not personally know the plaintiff. The warrant was merely one of a series that were issued as a part of the sting operation. Plaintiff was treated no differently from any of the other suspects in the undercover operation.

Therefore, we find no error as to this assignment.

B. *Defendant Larry Bedford.* The jury also returned a verdict against defendant Bedford on the section 1983 constitutional claim of exceeding the scope of the search warrant and awarded punitive damages. We must examine the record to determine if there is substantial evidence that Bedford was motivated by evil motive or intent or reckless or callous indifference to plaintiff's con-

stitutional rights. *Id.* at 56, 103 S. Ct. at 1625, 75 L. Ed. 2d at 651.

The search warrant authorized defendants to search for and seize certain specified items such as shotguns, a handgun and a TV set. In addition, defendants were authorized to seize property obtained in violation of the law, property the possession of which is illegal, property used or possessed with the intent to be used as a means of committing a public offense or concealed with the intent to prevent an offense from being discovered, or property relevant and material as evidence in a criminal prosecution. *See State v. Hamilton,* 236 N.W.2d 325, 329 (Iowa 1975).

The record shows that Bedford was in charge of the execution of the search warrant at the Willson Auto Body Shop. The warrant that he was executing allowed him to search for specific items listed on it. Although he did not find the listed items, it appears that he took several pieces of property from the shop down to the police station where it later could be determined if the property was stolen. He had no reasonable basis to believe that most of this property was stolen or contraband. Basically, the only pieces of property from the auto body shop that Bedford left behind were those items that were too heavy to lift into the truck to be transported to the police station. The record also indicates that he searched areas of the shop where the items for which he was authorized to search could not have been located. Bedford's method of seizing property at best can be characterized as a "take now and check later" type of an operation.

Therefore, we conclude that there was substantial evidence from which the jury could determine that defendant Bedford exceeded the scope of the search warrant

and had a reckless or callous indifference to plaintiff's constitutional rights. The district court erred in directing a verdict on this issue as to defendant Bedford.

V. *Disposition.* As to defendants' appeal, we affirm the conclusion of the district court that 42 U.S.C. section 1983 controls and provides an actionable independent remedy for the deprivation of plaintiff's constitutional rights. Accordingly, district court attorney fees properly were awarded to plaintiff under 42 U.S.C. section 1988. On appeal, we conclude plaintiff is entitled to $5,000 in appellate attorney fees.

On plaintiff's cross-appeal, we affirm the district court's directing of a verdict against plaintiff on the issues of the invasion of privacy claim and the award of punitive damages against defendant Brown. We reverse the district court's directing of a verdict on the issue of punitive damages against defendant Bedford.

Therefore, we affirm the present judgment against defendant Brown and the City of Des Moines under section 1983 for $500 compensatory damages in connection with the application for the search warrant. We affirm the present judgment against defendant Bedford and the City of Des Moines under section 1983 for $5,150 compensatory damages in connection with the execution of the search warrant. We reverse and remand with directions that judgment be entered in favor of plaintiff against defendant Bedford for $1,000 punitive damages in connection with the execution of the search warrant. We affirm the judgment against the City of Des Moines for $258.50 on the conversion count. We also affirm the district court judgment concerning attorney fees and for interest and costs as provided by law. Plaintiff is awarded $5,000 attorney fees as costs in connection with this appeal. *See Blessum*, 295 N.W.2d at 846.

Plaintiff also has filed a motion in this court to tax the cost of preparing the trial transcript and to impose double costs on defendants. Rule of Appellate Procedure 10(b) provides that the transcript cost be taxed in the district court. Plaintiff's motion is overruled. Costs in this court are taxed one-fourth to plaintiff and three-fourths to defendants.

AFFIRMED ON APPEAL; AFFIRMED IN PART AND REVERSED IN PART ON PLAINTIFF'S CROSS-APPEAL; AND REMANDED.

APPENDIX B

(Filed September 25, 1981)

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

ROBERT L. WILLSON and CAROL M. WILLSON, Plaintiffs,	)	
vs.	)	No. CL-40-23626
CITY OF DES MOINES, IOWA et al., Defendants	)	

RULING (ON MOTION TO STRIKE AND MOTION TO DISMISS)

On September 18, 1981, the Defendants' Motion to Strike and Motion to Dismiss came on for hearing. Appearing for Plaintiff was William J. Conroy, Jr. Appearing for Defendants was J. M. Sullivan. The Court has heard and considered the arguments of both counsel on each issue.

Ruling on Motion to Strike Claim under 42 U.S.C. §1983

The Defendants have moved to strike the Plaintiff's claim under §1983, because the Plaintiffs' claim under §1983 are covered by their common law claims. The Plaintiffs have not identified any claim under §1983 that is not covered by their common law claim. As a result, the Plaintiffs' §1983 claim duplicates the Plaintiffs' common law claims and therefore is unnecessary. Furthermore, submission of the Plaintiffs' §1983 claim, with its

common law claims to a jury would result in improper duplication of claims. Accordingly, the Defendants' motion to strike the Plaintiffs' §1983 claim is sustained under Rule 113, Iowa Rules of Civil Procedure.

Ruling on Motion to Dismiss Trespass Claim

The Defendants have moved to dismiss the Plaintiffs' trespass claim. The Plaintiffs allege the Defendants committed trespass by entering their auto body shop and home. The Plaintiffs also allege this was done pursuant to a search warrant issued by Judge Critelli.

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Since the Defendants were acting pursuant to a search warrant, they were privileged to enter the Plaintiffs' auto body shop and home. 87 C.J.S. *Trespass* § 55. Accordingly, the Defendants Motion to Dismiss trespass claim is sustained.

(Filed May 10, 1984)

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

ROBERT L. WILLSON and CAROL M. WILLSON, Plaintiffs,	)	
vs.	)	No. CL-40-23626
CITY OF DES MOINES, IOWA et al., Defendants	)	

RULING (ON MOTIONS FOR LEAVE TO AMEND AND TO RECONSIDER)

Comes now before the Court plaintiffs' Motion to Amend. This matter came on for hearing on April 6, 1984. The plaintiff was represented by William J. Conroy, Jr. Loren Braud, Assistant City Attorney, represented the defendants. After examining the file and having heard the arguments of counsel, the Court finds that the plaintiffs' Motion should be, and hereby is, granted. This finding is based upon the Court's resolution of two major issues presented by the Motion: 1) should the plaintiffs be allowed to amend to add new factual allegations and causes of action at this stage in the litigation; and 2) if new causes of action are allowed, do they relate back to the original petition so as be deemed filed within the appropriate time limitation. Pursuant to the law set forth below, the Court has resolved both issues in favor of the plaintiffs.

The law regarding when an amendment is to be allowed consists of several well-established propositions

leaving much discretion with the trial judge. "Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires." I.R.C.P. 88. Amendments are the rule, and denials are the exception. *Ackerman v. Lauver,* 242 N.W.2d 342, 345 (Iowa 1976). The trial court has considerable discretion in allowing amendments. Id. Its decision to allow or disallow an amendment will not be overturned absent a clear abuse of that discretion. *M-Z Enterprises v. Hawkeye Security Ins. Co.,* 318 N.W.2d 408, 411 (Iowa 1982). Amendments may be allowed at any time before a case is finally decided, even after completion of the evidence. Ackerman v. Lauver, supra, 242 N.W.2d at 345. They should not be allowed, however, if

[Page 2]

responsive pleadings have already been filed, and the amendments would substantially change the issues in the case. *Id.* Other factors to be considered by the Court are the degree to which the non-amending party would be prejudiced by the allowance of the amendment, given that party's interest in being adequately prepared for trial, and the extent to which the amending party's delay in precisely formulating its position is attributable to factors beyond its control. *See Farmers Ins. Group v. Merryweather,* 214 N.W.2d 184 (Iowa 1974); *see also* 61A Am. Jur.2d PLEADING §§ 309 et seq. (1981).

In ruling that the amendments proffered herein should be allowed, this Court relies on the general presumption in favor of such allowance existing under Iowa law, the minimal degree to which the factual allegations have been altered, the apparent justification for such alteration at this time, and the plaintiffs' willingness to make scheduling concessions in order to allow the de-

fendants time to properly prepare their defense to the amended petition. *See generally Ackerman v. Lauver,* 242 N.W.2d 342 (1976) (availability of continuance relevant to determination of whether opposing party would be prejudiced by an amendment). Other factors mitigating in favor of allowing the amendments are the defendants' failure to demonstrate that they would be prejudiced by the amendments, and the similarity between the reputational damages alleged in the initial petition (page 3) and the damages due to defamation and invasion of privacy alleged in the amended counts. Due to the latter factor, it cannot realistically be stated that plaintiffs' amendments have substantially changed the issues to the detriment of the defendants. *Compare Parker v. Tuttle,* 260 N.W.2d 843 (Iowa 1977) (leave to amend denied one day

[Page 3]

before trial); *Farmers Ins. Group v. Merryweather,* 214 N.W.2d 184 (Iowa 1974) (leave to amend denied at time of trial). Therefore, leave to amend is hereby granted.

In addition, the Court finds that the tort claims relate back to the date of the original petition so as not to be precluded by the 613.5 limitation. The threshold requirement for relation back under rule 89 is that the claim pleaded in the amendment arise from the same "conduct, transaction, or occurrence described in the original pleading." *M-Z Enterprises v. Hawkeye Security Ins. Co.,* 318 N.W.2d 408, 411 (Iowa 1982). The Court has determined that the new claims and factual allegations raised by plaintiffs arise out of the same conduct and occurrences as did the original petition, i.e., the same searches and seizures and related police conduct upon which the plaintiffs based their original civil rights and tort claims. The

mere addition of a few factual claims, revealed to plaintiffs through discovery, does not, in and of itself, constitute the initiation of a new lawsuit. The purpose of the relation-back rule is to insure that a statute of limitations is not used mechanically to prevent adjudication of claims where the defendant was made aware of the fact situation upon which the amended petition was based by the original petition. *Hampton v. Hanrahan,* 522 F. Supp. 140 (D.C.Ill. 1981).

As an additional matter, this Court hereby grants the plaintiffs' Motion to Reconsider to the extent that their 42 U.S.C. 1983 claim is reinstated. The Court finds that such reinstatement is proper because: A) a 1983 action is predicated upon grounds different from those upon which a state tort claim is predicated; B) a 1983 action constitutes an attempt to vindicate different rights from those vindicated through a state tort claim, or, at the very least, a viable alternative method of vindicating rights vindicatable (sic) in state tort claim action; and C) the plaintiffs properly pled a 1983 action, and alleged facts under which recovery could be had. In short, the 1983 claim is based upon federal statutory and constitutional rights, and is neither "duplicitous of" nor "covered by" the state tort claims. *See Baker v. McCollan,* 99 S.Ct. 2689 (1979).

[Page 4]

That a 1983 claim is independent of a state tort claim, and vindicates rights different from those vindicated in a state tort claim is demonstrated by the following passage from the American Jurisprudence Second:

> Section 1983 of 42 U.S.C.S. creates no separate rights, but rather provides remedies for the enforcement of right, arising under the constitution or laws of the United States. The rights protected thereby, that is,

> the "rights, privileges, or immunities secured, by the constitution and laws," are difficult to enumerate, but they include all the rights guaranteed by the fourteenth amendment, such as those rights which are protected by the due process, the privileges and immunities, and the equal protection clauses thereof. . . the rights protected by Sec. 1983 are civil rights only; the statute does not extend to the protection of political rights. Neither can a suit be maintained under 42 U.S.C.S. §1983 to vindicate rights derived solely from state law.

15 Am.Jur.2d CIVIL RIGHTS Sec. 19 (1974); *see also Tarpley v. Greene,* 684 F.2d 1, 8 (D.C. Cir. 1982) (Section 1983 is not "coterminous" with the law of tort). *Clappier v. Flynn,* 605 F.2d 519 (10th Cir. 1979) (Existence of adequate state remedy does not bar recovery under 42 U.S. C.S. 1983); *Sigler v. Lowrie,* 404 F.2d 659 (8th Cir. 1969) (1983 is not concerned with violations of state law).

In *Clappier,* cited above, the court stated:

> It is well settled, of course, that if the actions of law enforcement officers result in a deprivation of a federally protected right, the existence of an adequate state remedy does not bar recovery under 42 U.S.C. Sec. 1983 (citations omitted). The 'federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked' (citations omitted). In terms of pleading and joining the state tort remedy with the "supplemental" federal remedy, courts have allowed both legal theories to proceed in the same suit either on the grounds that the state tort law remedy is supported by an independent jurisdictional basis, as in this case, or on the grounds that, in the court's discretion,

> it may be heard under the doctrine of "pendant" jurisdiction.

605 F.2d 519. In *Clappier,* the court allowed both a negligence claim and a civil rights claim, but held that as each arose from identical facts and sought compensation for the same damage, only one recovery would be allowed, 605 F.2d at 531.

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That plaintiff has adequately stated a 1983 claim is demonstrated from the following passage in Corpus Juris Secundum:

> Under the Civil Rights Act of 1871, providing for a civil action for deprivation of rights, privileges or immunities secured by the constitution or laws, plaintiffs as individuals must allege a deprivation of their own federally protected rights in order to state a claim, but the complaint need not set out the particular portion of the constitution or law securing the right claimed to have been deprived, even though the court, to sustain the cause or action, must ascertain from the confines of the constitution or laws that such right exists.

14 C.J.S. Supp. CIVIL RIGHTS Sec. 153 (1974) *citing, inter alia, Williams v. Stone,* 330 F.Supp. 1298 (E.D. Tenn. 1971); *Beauregard v. Wingard,* 230 F.Supp. 167 (S.D. Cal. 1964). The plaintiff's petition states:

> That such conduct by defendants . . . was in total disregard of the rights secured and guaranteed to these plaintiffs by the United States and Iowa constitutions and statutes, specifically the Fourth and Fourteenth Amendments of the United States Constitution . . .

Count I, Paragraph 18. Though incorrectly citing Iowa law, the plaintiff has obviously stated a proper claim under 42 U.S.C. 1983.

That such a claim may be had in the fact situation presented here as demonstrated by numerous cases. *Tarplay v. Greene, supra,* involved both a 1983 action based upon violations of the Fourth and Fourteenth Amendment, and also pendant state claims of trespass, conversion, false arrest, and false imprisonment amongst others. There the District of Columbia Circuit held that law enforcement officers having a good faith and reasonable belief in the validity of a search warrant may nonetheless incur liability under 1983 if the warrant is not executed in a reasonable manner. 684 F.2d at 3. The Fifth Circuit has held the same. *Duncan v. Barnes,* 592 F.2d 1336, 1338 (5th Cir. 1979). As a general rule, allegations of illegal searches perpetrated by public officials are sufficient grounds to bestow jurisdiction under 42 U.S.C.S. §1983; *Gillibeau v. Richmond,* 417 F.2d 426 (9th Cir. 1969).

For the reasons enumerated above, Count I of plaintiff's Petition should be reinstated.

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the supreme Court declaration that punitive damages may not be recovered against municipalities. *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748 (1981). Paragraph 21 of the Plaintiffs' Amended and Substituted Petition, therefore, is stricken as to the City of Des Moines.

RULING

IT IS HEREBY ORDERED that the Motion for Leave to Amend is granted.

IT IS FURTHER ORDERED that the Motion to Reconsider is granted and the 1983 action shall be reinstated as a part of this case subject to the declaration that punitive damages may not be recovered against municipalities. Paragraph 21 of the plaintiff's amended and substituted petition, therefore, is stricken as to the City of Des Moines, Iowa.

(Filed August 21, 1984)

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

ROBERT L. WILLSON and CAROL M. WILLSON, Plaintiffs,	)	No. CL 40-23626
vs.	)	
CITY OF DES MOINES, IOWA, et al., Defendants.	)	

RULINGS ON MOTIONS FOR DIRECTED VERDICT

Defendants timely moved for directed verdicts. The motions were in part sustained and granted at the close of all of the evidence, with further rulings on the motions reserved. Remaining issues were submitted to the jury and verdicts were returned. The Court will now rule upon the entire Motion for Directed Verdict, indicating that part ruled upon prior to submission to the jury and that part ruled upon after jury verdict.

For all purposes the Motions for Directed Verdict are treated as motions for involuntary dismissal under R.C.P. 216.

The Court, when ruling on motions claiming plaintiff has shown no right to relief under the facts, views the evidence in the light most favorable to the plaintiff, deems the evidence to be the truth, and draws from that evidence every inference favorable to plaintiff that may fairly and reasonably be deducted. Wernimont v. State, 312 N.W. 2d 568 (Iowa 1981).

Defendants' Motions for Directed Verdict refer to specific allegations stated in plaintiff's amended and substituted petition, and amendments thereto, filed March 13, 1984. The Court, in these rulings, uses the same references.

1. *Par. 7, Count I,* (entry into home and body shop by confidential informant on or about January 10, 1981, without a search warrant) for the reason that Iowa Code Chapter 613A provides exclusive remedy and therefore plaintiff fails to state a claim for

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which relief may be granted. All defendants. Overruled. See RULING of Judge Novak filed May 10, 1984, establishing the law of this case.

2. *Par. 7, Count I,* (entry into home and body shop by confidential informant on or about January 10, 1981, without a search warrant) for the reason plaintiff failed to plead or prove compliance with Iowa Code Section 613A.5 as to the alleged January 10, 1981, search, claim for damages therefor being first made in the Amended and Substituted Petition filed March 13, 1984. All defendants. Overruled. See RULING of John Novak filed May 10, 1984, establishing the law of this case.

3. *Pars. 8, 9 and 10, Count I,* (application and issuance of search warrant without full disclosure to issuing Court) for the reason that no cause of action exists for perjury under Section 1983 or Iowa law. All defendants. Overruled. See RULING of Judge Novak filed May 10, 1984, establishing the law of this case.

4. *Pars. 8, 9 and 10, Count I,* (application and issuance of search warrant without full disclosure to issuing Court) for the reason that plaintiff's cause of action, if any, is malicious prosecution and thus no remedy is avail-

able under Section 1983. All defendants. Overruled. See RULING of Judge Novak filed May 10, 1984, establishing the law of this case.

5. *Pars. 8, 9 and 10, Count I,* (application and issuance of search warrant without full disclosure to issuing Court) for the reason that there is no evidence in the record upon which the jury could find personal involvement of certain of the defendants in procuring the warrant. Defendants Bedford, Rector and Shaffer. (Jury Instruction No. 16.) Ruling on Motion reserved until return of verdicts. (Verdict Form No. 4.) Motion sustained as to defendants Bedford, Rector and Schaffer.

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6. *Pars. 8, 9 and 10, Count I,* (application and issuance of search warrant without full disclosure to issuing Court) for the reason that probable cause existed for the issuance of the search warrant independent of information provided by confidential informant No. 1. All defendants. (Jury Instruction No. 16.) (Verdict Form No. 4.) Overruled.

7. *Pars. 11, 12, 13, 14, 15, 16, 17 and 18, Count I,* (exceeding scope of warrant) for the reason that an officer has no liability pursuant to Section 1983 for executing a search warrant valid on its face, in a reasonable manner. All defendants. (Jury Instruction No. 15.) (Verdict Form No. 3.) Overruled. See RULING of Judge Novak filed May 10, 1984, establishing the law of this case.

8. *Pars. 11, 12, 13, 14, 15, 16, 17 and 18, Count I.* The reason stated is that officers as a matter of law, had probable cause to seize property, not identified in the warrant, if the property was in plain view and the officers believed the same was stolen. All defendants. Overruled. (Jury Instruction No. 15.) (Verdict Form No. 3.)

9. Pars. 11, 12, 13, 41, 51, 16 and 17, Count I, (exceeding scope of warrant) for the reason that there is no evidence in the record upon which the jury could find personal involvement of certain of the defendants in conducting the search and/or seizure. Defendants Schaffer and Rector. (Instruction No. 15.) (Verdict Form No. 3.) Ruling reserved until return of verdict. Motion sustained as to defendant Rector and overruled as to defendant Schaffer.

10. *Count III,* (interference with prospective business advantage,) in its entirety, for the reason that there is no evidence in the record that specific prospective contractual relationship with any particular person existed and was interfered with, that defendants had knowledge of any prospective contractual relationship,

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that any act of any defendant was done with a specific intent to interfere with a prospective contractual relationship, and that any action by any of the defendants resulted in the failure of some person to enter into a contractual relationship with plaintiff. All defendants. (Instruction Nos. 32 and 33.) (Verdict Form No. 6.) Sustained as to defendants Rector and Schaffer before submission to jury. Ruling reserved as to defendants Brown and Bedford until return of verdict. Sustained as to defendants Brown and Bedford after return of verdict. The record is void of any evidence (substantial evidence) of a purpose on the part of any defendant to injure or destroy the plaintiff. *Farmers Cooperative Elevator v. State Bank,* 236 NW2d 674 (Iowa 1975.)

11. *Count VI,* (invasion of privacy/false light) for the reason that there is no evidence that any defendant made

a publication placing plaintiff before the public in a light, there is no evidence on the record that any defendant had knowledge or acted in a reckless disregard as to the falsity of a publicized matter, that defendants making publications, if any, did so in the course of their official duties, that the publications, if any, were reports of official actions or proceedngs, and that defendants are immune from damages as a matter of law, and that plaintiff failed to plead and prove compliance with Iowa Code Section 613A.5. All defendants. (Instruction Nos. 38, 39 and 40.) (Verdict Form No. 8.) Sustained as to defendants Rector, Schaffer and Bedford before submission to jury due to lack of evidence of any personal involvement. Ruling reserved as to defendant Brown until return of verdict. Verdict of $3,000.00 actual and $500.00 punitive returned against defendant Brown. The jury specifically found that $2,500.00 of the $3,000.00 actual damages resulted from "loss of profits to the auto body shop." Motion sustained as to defendant Brown after return of jury verdict

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for the reason that the record is void of any evidence that defendant Brown had knowledge of the falsity or acted in reckless disregard of the falsity of the publicized matter and the false light in which plaintiff would be placed by the publication. In view of RULING of Judge Novak filed May 10, 1984, establishing the law of this case, defendants' Motions for Directed Verdict based upon plaintiff's failure to comply with Iowa Code Section 613A.5 are denied.

12. *Punitive Damages,* all counts, for the reason that there is no evidence of any malice, actual or otherwise, on the part of any defendant. All defendants. The standard for punitive damages on the 1983 claims requires evidence of a "reckless or callous disregard for plaintiff's rights,

as well as intentional violations of federal law." *Smith v. Wade,* 103 S. Ct 1625 (1983). (Instruction 30.) The standard for punitive on the common law claims, where the defendants are public officials, requires evidence of actual malice, as opposed to legal or inferred malice resulting from a lack of probable cause. *Vander Linden v. Crews,* 231 NW2d 904 (Iowa 1975). (Instruction No. 57.)

The record is void of any evidence that any defendant's conduct toward plaintiff or his property was reckless or callously disregarded plaintiff's rights or was an intentional violation of federal law or was motivated by actual malice toward plaintiff. Motion For Directed Verdict on issue of punitive damages sustained as to defendants Schaffer and Rector prior to submission to jury, and sustained as to defendants Bedford and Brown after return of jury verdict.

(Filed August 29, 1984)

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

ROBERT L. WILLSON and CAROL M. WILLSON, Plaintiffs,	)	
vs.	)	No. CL 40-23626
CITY OF DES MOINES, IOWA, et al., Defendants.	)	

RULING ON DEFENDANTS' MOTION TO ENLARGE FINDINGS

Defendants Brown, Bedford, and City of Des Moines filed MOTION TO ENLARGE FINDINGS on August 23, 1984. In the prayer of the motion the Court is requested "to enlarge its judgment on the verdict" in certain specifics and on certain issues. Apparently defendants intend that their motion be a motion under R.C.P. 179.

The above case was tried to a jury. R.C.P. 179 motions are not applicable to jury cases. *Budde v. City Development Bd.*, 276 NW2d 846 (Iowa 1979).

Issues raised in the motion are legal issues that have previously been determined by the Court in this case. RULING of Judge Novak filed May 10, 1984.

An award of attorney's fees after a recovery on a Section 1983 action bears interest from the date of judgment. *R.W.T. v. Dalton*, 712 F2d 1225 (8th Cir.), *Cert. denied*, 104 S.Ct., 527 (1983).

Defendants' motion is overruled and denied.

(Filed August 31, 1984)

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

ROBERT L. WILLSON and CAROL M. WILLSON, Plaintiffs,	)	
vs.	)	No. CL 40-23626
CITY OF DES MOINES, IOWA, et al., Defendants.	)	

RULING ON MOTION TO RECONSIDER

(Docket entry ruling of Court written in longhand).

Motion to Reconsider before the Court - Attorneys present - statements of Attorneys reported - Cts ruling stated on record -

Motion raises issues previously presented and ruled upon.

Motion overruled and denied.

APPENDIX C

(Filed May 21, 1986)

IN THE SUPREME COURT OF IOWA

ROBERT L. WILLSON, Appellee,	)	
vs.	)	No. 84-1531
CITY OF DES MOINES, IOWA; NICK BROWN; and LARRY BEDFORD, Appellants.	)	

ORDER

After consideration by the court en banc, appellants' petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 21st day of May, 1986.

THE SUPREME COURT OF IOWA

By /s/ W. W. Reynoldson
W. W. Reynoldson, Chief Justice

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(Filed August 21, 1984)

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

ROBERT L. WILLSON and CAROL M. WILSON,	)	
Plaintiffs,	)	No. CL40-23626
vs.	)	
CITY OF DES MOINES, IOWA, et al.,	)	
Defendants.	)	

JUDGMENT ON VERDICT

BE IT REMEMBERED that on August 8, 1984, the jury returned verdicts in the above entitled case. The Court, after ruling upon pending Motions For Directed Verdict, as set forth in RULING dated August 17, 1984, now enters judgments upon said verdicts as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff, Robert L. Willson, have and recover judgment against defendant, Larry Bedford, for the sum of Five Thousand One Hundred Fifty Dollars ($5,150.00) on Count I of plaintiff's Amended and Substituted Petition, said judgment being a recovery under 42 U.S.C. Section 1983.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, pursuant to Iowa Code Section 613A.2, that defendant, City of Des Moines, Iowa, is liable for the torts of defendant, Larry Bedford, an officer of defendant City, acting within the scope of his employment or duties, and accordingly plaintiff, Robert L. Willson, shall also have and recover judgment against defendant, City of Des Moines, Iowa, for said sum of Five Thousand One Hundred Fifty Dollars ($5,150.00).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff, Robert L. Willson, have and recover judgment against defendant, Nick Brown, for the sum of Five Hundred Dollars ($500.00) on Count I of plaintiff's Amended and Substituted Petition, said judgment being a recovery under 42 U.S.C. 1983.

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, pursuant to Iowa Code Section 613.A.2, that defendant, City of Des Moines, Iowa, is liable for the torts of defendant, Nick Brown, an officer of defendant City, acting within the scope of his employment or duties, and accordingly plaintiff, Robert L. Willson, shall also have and recover judgment against defendant, City of Des Moines, Iowa, for said sum of Five Hundred Dollars ($500.00).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff, Robert L. Willson, have and recover additional judgment against defendant, City of Des Moines, Iowa, for the sum of Two Hundred Fifty-Eight Dollars and Fifty Cents ($258.50) on Count II of plaintiff's Amended and Substituted Petition.

The Court further finds and adjudges, in view of the jury verdicts and judgments rendered thereon, pursuant to 42 U.S.C. 1983, that plaintiff, Robert L. Willson, is entitled to recover a reasonable attorney's fee as part of the costs in this action under 42 U.S.C. 1988. After hearing to determine and fix the amount of the fair and reasonable attorney's fee for plaintiff's attorney for necessary services rendered, a supplemental judgment in plaintiff's favor against the defendant, City of Des Moines, Iowa, shall draw interest at ten percent per annum from August 8, 1984, until paid.

Costs are assessed against defendant, City of Des Moines, Iowa, in the amount of $.....

(Filed August 31, 1984)

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

ROBERT L. WILLSON and CAROL M. WILLSON, Plaintiffs,	)	
vs.	)	No. CL 40-23626
CITY OF DES MOINES, IOWA, et al., Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY OF JUDGMENT FOR ATTORNEY'S FEES

On August 30, 1984, plaintiff's APPLICATION FOR REASONABLE ATTORNEY'S FEES and also plaintiff's SUPPLEMENTAL APPLICATION FOR REASONABLE ATTORNEY'S FEES came on for hearing. Plaintiff appeared by his attorney of record, William J. Conroy, Jr. Defendants appeared by J. M. Sullivan, Assistant City Attorney. The Court, after considering the APPLICATION and also the SUPPLEMENTAL APPLICATION, and after hearing the evidence and statements of counsel, and after reviewing the court file and considering the trial proceedings, finds the following facts:

FINDINGS OF FACT

The Court finds the following facts:

1. Plaintiff's petition was filed with the clerk on June 11, 1981. Plaintiff asserted one constitutional claim under 42 U.S.C. Section 1983 and five state claims. The petition designated seven Des Moines Police Officers as defendants, as well as the City of Des Moines as a defen-

dant. It is material to the matter before the Court that the City of Des Moines and four Des Moines Police Officers remained as defendants when the case was submitted to the jury for determination.

2. By a RULING filed with the clerk on September 25, 1981, defendants' motion to strike the plaintiff's constitutional claim was sustained.

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3. After considerable discovery and on plaintiff's MOTION TO RECONSIDER RULING, and on plaintiff's MOTION FOR LEAVE TO AMEND AND SUBSTITUTE PETITION, the Court by RULING filed May 10, 1984, reconsidered its ruling striking the constitutional claim and granted and sustained plaintiff's MOTION FOR LEAVE TO AMEND. Plaintiff, in PLAINTIFF'S AMENDED AND SUBSTITUTED PETITION, reasserted the constitutional claim initially alleged and in addition alleged additional constitutional deprivations. Plaintiff's attorney was required to expend considerable time and effort relative to the reinstatement of the constitutional claims. The court file establishes the extent of the briefing and proceedings relative to the reinstatement of the constitutional claim.

4. Plaintiff's attorney, prior to trial, filed with the court a trial brief and requested jury instructions addressing complex and multifaceted legal issues.

5. Trial commenced on July 23, 1984. Formal court proceedings consumed approximately eleven days. In addition, attorneys for the litigants and the Court worked on instructions on Sunday, August 5, 1984, for approximately eight hours.

6. On August 8, 1984, the jury returned a verdict in favor of plaintiff on constitutional claims and state claims.

7. On August 21, 1984, the Court filed JUDGMENT ON VERDICT wherein plaintiff recovered money judgments on two constitutional claims against two individual defendants and the defendant City and a money judgment on a state claim against the defendant City.

8. Judgment was entered only on those claims withstanding defendants' motions for directed verdict, rulings upon which were reserved until return of verdict. Defendants' motions for directed verdict were sustained on all claims as to all defendants as to

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punitive damages and on all state claims as to all defendants except a conversion claim as to defendant City of Des Moines, the jury's verdict on the conversion claim being in the amount of $258.50. The Court, in its JUDGMENT ON VERDICT filed August 21, 1984, adjudged, as a matter of law, that plaintiff was entitled to recover a reasonable attorney's fee as part of the costs of the action under 42 U.S.C. 1988.

9. While both constitutional and state claims were asserted, plaintiff's claims and the resulting litigation essentially and substantially involved constitutional issues, to-wit: Claimed deprivation of plaintiff's Fourth Amendment rights.

10. The constitutional claim based upon multiple Fourth Amendment deprivations was certainly novel and comparatively difficult from a standpoint of pleading, discovery, ascertaining and presenting evidence, and instructing the jury.

11. Trial preparation and trial of plaintiff's case based upon Fourth deprivations required that plaintiff's counsel

possess an extraordinary knowledge of constitutional law or through research become an expert in the area. Plaintiff's counsel is expert in the area.

12. The very nature of plaintiff's claim and the proving of plaintiff's constitutional claim where "probable cause" is a standard is comparatively difficult. Plaintiff's counsel demonstrated a high degree of diligence in locating and presenting evidence to support the claims of his client.

13. Plaintiff's counsel, in bringing and prosecuting plaintiff's action, was representing what could be considered and probably was considered an undesirable suit, representing an undesirable client. Plaintiff's reputation, whether based on fact or fiction, was that he was a fence. Plaintiff's case was passed up and referred to plaintiff's counsel of record by several other prominent attorneys who specialize in plaintiff's cases.

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14. Plaintiff's attorney has itemized his time and services rendered to plaintiff in this action. His itemization shows 413.45 hours spent on behalf of his client. The Court finds that the itemization of services and time is true and correct. The Court further finds that 350 hours of plaintiff's attorney's time was spent directly on the constitutional claims. The Court further finds that it was reasonably necessary and required that plaintiff's attorney expend 350 hours representing his client on the constitutional claims in this matter. The Court further finds that plaintiff was fully benefited by the 350 hours of plaintiff's attorney's time expended on behalf of plaintiff.

15. Plaintiff's attorney claims a fee of $75.00 per hour for all hours logged.

16. $75.00 per hour is a fair and reasonable fee for an attorney representing a client in a litigated matter involving complex and multiple issues of law and fact in Polk County, Iowa, in the years 1981, 1982, 1983, and 1984.

17. $75.00 per hour is a fair and reasonable fee for the services of plaintiff's attorney rendered to plaintiff in this case if plaintiff was to compensate attorney Conroy on an hourly basis with his private funds.

18. Since in this case there is certainty of payment by virtue of the provisions of 42 U.S.C. Section 1988 and Iowa Code Chapter 613A, the fair and reasonable ordinary fee of $75.00 per hour that would be paid by a private client is discounted to $60.00 per hour. $60.00 per hour is the fair and reasonable hourly rate for plaintiff's attorney for services rendered to plaintiff in this case when there is certainty of payment.

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19. Plaintiff and attorney Conroy entered into conditional contingent fee arrangements. These agreements do not establish compensation for plaintiff's counsel based on an hourly charge or fee certain.

20. Plaintiff's attorney expended on behalf of his client the sum of $58.42 for toll calls. These expenditures were directly related to and necessary to the proper and full representation of plaintiff by plaintiff's attorney.

CONCLUSIONS OF LAW

42 U.S.C. Section 1988 provides in federal civil rights actions the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs. Plaintiff is the prevailing party and, in view of the very nature and thrust of the

case, plaintiff should be allowed and is entitled to a reasonable attorney's fee.

This Court, in determining what is a reasonable attorney's fee, must take into consideration these factors:

1. The time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the services properly.
4. The preclusion of other employment.
5. The customary fee in the community for similar work.
6. The fixed or contingent nature of the fee.
7. Time limitations imposed by the client of the circumstances.
8. The amount involved and the results obtained.
9. The experience, reputation and ability of the attorneys.
10. The undesirability of the case.
11. The nature and length of the professional relationship of the client.
12. Awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (7th Cir. 1974). The *Johnson* factors are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983). The attorney's time expended to be compensable must be reasonable. *Hensley supra*. Rate of hourly

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compensation to be allowed and fixed must be the prevailing market rates in the relevant community. *Blum v. Stenson,* 104 S.Ct. 1541 (1984).

Meeting this criteria, attorney Conroy expended 350 compensable hours on behalf on his client. The reasonable value of his services for purposes of a Section 1988 attorney's fee allowance is $60.00 per hour. Thus plaintiff is entitled to an allowance of attorney's fees in this case of $21,000.00. In addition, plaintiff is entitled to a reimbursement of reasonable and necessary expenditures made by his attorney relative to the attorney's representation of him in the amount of $58.42. Plaintiff's attorney's fee is allowed and fixed in the sum of $21,058.42.

ENTRY OF JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, Robert L. Willson, have and recover judgment for costs against defendant, Larry Bedford, and defendant, Nick Brown, pursuant to 42 U.S.C. 1988, for the sum of $21,058.42, said sum being in addition to the amounts stated in JUDGMENT ON VERDICT filed August 21, 1984.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to Iowa Code Section 613A.2, that defendant, City of Des Moines, Iowa, is liable for the torts of defendants, Larry Bedford and Nick Brown, officers of the defendant City, acting within the scope of their employment and duties, and accordingly, plaintiff, Robert L. Willson, shall also have and recover judgment for costs against defendant, City of Des Moines, Iowa, for said sum of $21,058.42.

The said sum allowed as a judgment for costs herein shall draw interest at 10 percent per annum from August 8, 1984, until paid.

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-259

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF DES MOINES, IOWA, NICK BROWN, and LARRY BEDFORD,
Petitioners,

vs.

ROBERT L. WILLSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

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No. 86-259

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vs.

ROBERT L. WILLSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Robert L. Willson, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Iowa in this case. That opinion is reported at 386 N.W. 2d 76 (Iowa 1986), and was reproduced as Appendix A to the petition for writ of certiorari.

JURISDICTION

Petitioners[1] assert that this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). (Pet. 2). The Supreme Court of Iowa's holding that the existence of state law remedies does not preclude Robert L. Willson's § 1983 ac-

1. Petitioners, City of Des Moines, Iowa, Nick Brown and Larry Bedford, are hereafter collectively referred to as "the City."

tion in state court is premised upon an independent and adequate state law ground. The City, by its own admission, has "from the inception of this case challenged [Willson's] § 1983 action on three grounds: . . . (3) Iowa Code Chapter 613A provides the *exclusive* remedy for any civil wrong such as Willson's in Iowa state courts against a municipality or one of its officers. Iowa Code § 613A.4." (Pet. 10-11). The Supreme Court of Iowa's conclusion that Willson's § 1983 claim was proper in the Iowa courts is a clear rejection of the City's argument that Iowa Code Chapter 613A is exclusive.[2] This rejection of Chapter 613A's exclusivity is a question of state law providing an independent and adequate state law ground for the Supreme Court of Iowa's holding. Therefore, the City's reliance on 28 U.S.C. § 1257(3) for this Court's jurisdiction is erroneous. *Klinger v. Missouri*, 13 Wall. 257, 263 (1871).

REASONS FOR DENYING THE WRIT

1. The decision of the Supreme Court of Iowa is not in conflict with a decision of the Supreme Court of South Carolina.

The Supreme Court of Iowa held that 42 U.S.C. § 1983 provides an actionable independent remedy in state court for the deprivation of Willson's rights under the fourth amendment of the United States Constitution. (Pet. A20). The Supreme Court of Iowa observed that the availability of state law claims was irrelevant to the availability of Willson's § 1983 fourth amendment claim in state court. (Pet. A13). This decision in no way conflicts with the decision of the Supreme Court of South Carolina in *Spencer v.*

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2. The Supreme Court of Iowa clearly rejected "[the City's] claim that this state remedy provides adequate relief, and thus, [Willson's] action under section 1983 is foreclosed." (Pet. A10).

South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386 (S.C. 1984), *aff'd by an equally divided court,* 471 U.S. 82 (1985).

In *Spencer,* the Supreme Court of South Carolina held that the denial of certain state income tax deductions to non-residents of South Carolina violated the privileges and immunities clause of the United States Constitution, art. IV, § 2, cl. 1. *Spencer,* 316 S.E.2d at 387-88. The Supreme Court of South Carolina affirmed, with virtually no discussion, the trial court's failure to address plaintiff's § 1983 claim. *Id.* at 388-89.

The Supreme Court of Iowa accepted jurisdiction and passed upon the merits of Willson's § 1983 claim; the Supreme Court of South Carolina simply affirmed the trial court's unwillingness to address the § 1983 claim. There is, however, no conflict between these two decisions.

Whether or not the courts of South Carolina were obligated to entertain Spencer's § 1983 action is a question of some interest, previously reserved by this Court,[3] but is in no way raised by the decision below of the Supreme Court of Iowa. The Supreme Court of Iowa's affirmance of the availability of Willson's § 1983 claim in state court is entirely consistent with this Court's pronouncements in *Martinez v. California,* 444 U.S. 277, 283-84 n.7 (1980), and *Maine v. Thiboutot,* 448 U.S. 1, 3 n.1 (1980), that state courts may entertain § 1983 claims. These holdings belie the City's perplexing, unsupported and erroneous claim that "Congress did not intend to have § 1983 proceedings in state court." (Pet. 14).

There is simply no conflict between *Spencer* and the Supreme Court of Iowa's decision below. Moreover, these

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3. *Maine v. Thiboutot,* 448 U.S. 1, 3 n.1 (1980).

cases are clearly distinguishable on their facts. *Spencer* held that "[i]t may reasonably be inferred that the sole reason for alleging § 1983 was to justify the allowance of counsel fees." *Spencer,* 316 S.E.2d at 389. The purpose of Willson's § 1983 cause of action below was to allege an independent fourth amendment violation seeking, inter alia, punitive damages pursuant to *Smith v. Wade,* 461 U.S. 30 (1983), against the individual police officers. Indeed, the Supreme Court of Iowa specifically affirmed the jury award of $1,000.00 punitive damages under § 1983 against defendant Bedford. (Pet. A20). Punitive damages are unavailable under Iowa Code Chapter 613A (1985).[4] Thus, Willson was not utilizing § 1983 simply to justify the allowance of counsel fees.

In sum, the decision of the Supreme Court of Iowa is neither legally nor factually in conflict with *Spencer v. South Carolina Tax Commission,* 281 S.C. 492, 316 S.E.2d 386 (S.C. 1984), *aff'd by an equally divided court,* 471 U.S. 82 (1985).

2. The Supreme Court of Iowa has neither expanded the applicability of § 1983 nor is its holding in any way in conflict with this Court's prior precedents.

A. The Supreme Court of Iowa has not expanded the applicability of § 1983.

The City does not even suggest, let alone argue, that Willson's § 1983 claim, alleging violations of the fourth amendment of the United States Constitution, could not

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4. The Municipal Tort Claims Act, Iowa Code Chapter 613A (1985), which the City argues is the exclusive remedy for claims such as Willson's brought in state court (Pet. 7), specifically excludes punitive damages. Iowa Code § 613A.4(5) (1985).

have been brought in the federal district court. Indeed, no precedent of this Court, regardless of the availability of state law remedies, would foreclose Willson's § 1983 fourth amendment action in federal district court. Therefore, the decision by the Supreme Court of Iowa as to the applicability of a § 1983 action in its own state courts in no way expanded the applicability of § 1983. This Court has previously held that § 1983 actions may be properly brought in state court. *Martinez v. California,* 444 U.S. 277, 283-84 n.7 (1980); *Maine v. Thiboutot,* 448 U.S. 1, 3 n.1 (1980). A contrary holding would dramatically reduce state courts as a forum for litigating § 1983 claims. This would inevitably thrust putative state court litigants into, and impose a greater burden upon, the federal courts. *See, e.g., Patsy v. Florida,* 457 U.S. 496, 512 (1982).

B. The holding of the Supreme Court of Iowa does not in any way conflict with this Court's prior precedents.

The Supreme Court of Iowa concluded that "*Parratt* [*v. Taylor,* 451 U.S. 527 (1981)] does not apply to bar a section 1983 suit despite the availability of state post-deprivation remedies where the alleged deprivation violates specific Bill of Rights provisions." (Pet. A13). The court noted that *Parratt* "suggests that if a plaintiff has a post-deprivation state remedy available, due process may be satisfied." (Pet. A9). The Supreme Court of Iowa easily distinguished *Parratt* by noting that "[t]he *Parratt* doctrine only applies to claimed violations of procedural due process." (Pet. A11). The court went on to cite numerous federal courts that have clearly recognized the procedural due process/specific substantive constitutional rights distinction in applying the principles of *Parratt.* (Pet. A12 n.7). Nevertheless, the City makes the startling claim,

unsupported by any citation or rationale, that the holding by the Supreme Court of Iowa below "has eviscerated this Court's teaching in *Parratt.*" (Pet. 15). This is simply not so. This Court has never applied the principles of *Parratt* to substantive constitutional violations. Indeed, Justice Stevens recently noted that when pursuing a claim based upon one of the specific constitutional guarantees of the Bill of Rights, "the plaintiff may invoke § 1983 regardless of the availability of a state remedy." *Daniels v. Williams,* ..... U.S. ....., 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

The decision of the Supreme Court of Iowa below neither expanded the applicability of § 1983 nor contravened any prior precedent of this Court. Indeed, the holding below is entirely consistent with both *Parratt* and *Daniels.*

CONCLUSION

The Iowa Supreme Court's determination that the availability of a § 1983 action in its own state courts is not precluded by the existence of other state law remedies is a question of state law providing an independent and adequate state law ground depriving this Court of jurisdiction. Failing that, the decision of the Supreme Court of Iowa is not in conflict with the decision of the Supreme Court of South Carolina, nor has the Supreme Court of Iowa expanded the applicability of § 1983, nor does its holding in any way conflict with this Court's prior precedents. Therefore, respondent Robert L. Willson respectfully requests that the petition for writ of certiorari to the Supreme Court of Iowa be denied.

Respectfully submitted,

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